

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2538

ARGUED BY
SAMUEL GOTTLIEB, ESQ.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

HYMAN RADZINOWER,

Plaintiff-Appellant,

-against-

FIRST NATIONAL BANK OF BOSTON,

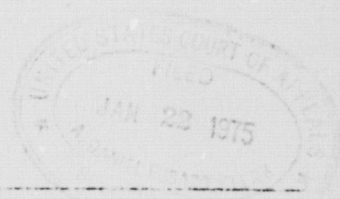
Defendant-Appellee,

-against-

P/S

TOUCHE, ROSE & CO., TELEPROMPTER
CORPORATION, JACK K. COOKE, RAYMOND
P. SHAFER, W.J. BRESMAN, H.J. SCHAPLY,
LEONARD TOM, R.C. TODD, JR., R.P.
SIMON, J.B. GREEN, L.H. READ, R.C.
WILSON, H.E. FLAHERTY, D.D. FISCHMAN,
BERNIE ADAMS, MARVIN CAPTON, R.P. LEWIS,
P.L. LOWE, CHARLES LUCKMAN, M.B.
MITCHELL, A.E. PUCKETT, J.H. RICHARDSON,
M.E. LIVINGSTON and JACK WRATHER,

Defendants.



BRIEF FOR PLAINTIFF-APPELLANT

IRA JAY SANDS
Attorney for Plaintiff-Appellant
701 Seventh Avenue
New York, New York 10036
(212) 265-3500

AND

Samuel Gottlieb
Ira J. Sands
Alan C. Krieger

Of Counsel

GAINSBURG, GOTTLIEB, LEVITAI & COLE
Co-Counsel for Plaintiff-Appellant
122 West 42nd Street
New York, New York 10017
(212) 627-3440

TABLE OF CONTENTS

	Page
Table of Cases and Statutes.....	ii
STATEMENT.....	1
ISSUE PRESENTED.....	1
THE OPINION BELOW.....	2
THE BROAD AND UNLIMITED DESIGNATION BY APPELLEE BOSTON BANK OF THE NEW YORK SUPERINTENDENT OF BANKS TO RECEIVE PROCESS IN ITS BEHALF.....	3
 Points	
I. THE NEW YORK SUPERINTENDENT OF BANKS WAS BROADLY DESIGNATED AS THE BOSTON BANK'S AGENT "UPON WHOM ALL LAWFUL PROCESSES IN ANY ACTION OR PROCEEDING AGAINST THIS BANK IN NEW YORK MAY BE SERVED IN LIKE MANNER AND WITH THE SAME EFFECT AS IF THIS BANK EXISTED THEREIN." VENUE IN THIS STATE WAS THEREFORE PROPER. IT WAS ERROR TO HOLD THAT THE BANK'S INTENT WAS NARROWER THAN THAT INDICATED BY THE UNLIMITED LAN- GUAGE OF THE DESIGNATION IT EXECUTED....	4
II. THE ORDER DISMISSING THE COMPLAINT ON THE GROUND OF IMPROPER VENUE SHOULD BE REVERSED.....	10

Cases Cited

	Page
Bruns, Nordeman & Co. v. American Nat. Bank & Trust Co., 394 F.2d 300, 2 Cir. 1968.....	4
Buffum v. Chase Nat. Bank of City of New York, 192 F.2d 58, 7 Cir. 1951.....	8,9
Gen. Electric Credit Corp. v. James Talcott, Inc., 271 F. Supp. 699, S.D.N.Y. 1966.....	4
Klein v. Bower, 421 F.2d 338, 2 Cir. 1970.....	4
Raleigh Assoc. v. Henry, 302 N.Y. 467.....	9
Rodolitz v. Neptune Paper Prods., 22 NY 2d 383.....	9
Southeast Guar. Tr. Co., Ltd. v. Rodman & Renshaw, Inc., 358 F. Supp. 1001.....	4

Statutes Cited

New York Banking Law, Art. 3, §131, subd. 3.....	1,5,7
Art. 5, §200.....	7
12 U.S.C. §94 (National Banking Act).....	4,7,9
15 U.S.C. §78a et seq. (Securities Exchange Act)....	1,4

BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT

Plaintiff appeals from an order entered in the United States District Court for the Southern District of New York, of Hon. LLOYD F. MacMAHON, United States District Judge, dated October 21, 1974, granting the motion of defendant-appellee, First National Bank of Boston, dismissing this action as to it on the ground of improper venue (A-56-7*).

THE ISSUE PRESENTED

Defendant-appellee, First National Bank of Boston (herein Boston Bank) was named as a party defendant in this class action upon the ground that it conducted banking business in the State of New York and was involved with defendant Teleprompter and other defendants in the acts violative of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the New York State Statute (Martin Act) and the common law; jurisdiction is based on § 27 of the Exchange Act and pendent jurisdiction (A-15-30).

No challenge was presented to the sufficiency of the allegations (A-16-28) upon which liability against the defendants was asserted and upon which recovery was sought. Appellee's motion to dismiss was predicated solely "on the ground of

*These numerical references are to the Joint Appendix.
All emphasis supplied, unless otherwise indicated.

improper venue" and was expressly granted on that basis (A-56-57).

THE OPINION BELOW

In granting the motion to dismiss, Judge MacMAHON ruled:

"Absent waiver or consent, a national bank may be sued only in the district in which it is established. 12 U.S.C. Section 94; Cope v. Anderson, 331 U.S. 461, 467 (1947); Klein v. Bower, 421 F.2d 338, 342 (2d Cir. 1970); Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), cert. denied, 393 U.S. 855 (1968); Buffum v. Chase Nat. Bank of City of N.Y., 192 F. 2d 58 (7th Cir. 1951), cert. denied, 342 U.S. 944 (1952). Movant is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94, because its charter specifies Boston as its principal place of business. Buffum v. Chase Nat. Bank of City of N.Y., supra, 192 F.2d at 60; Leonardi v. Chase Nat. Bank of City of N.Y., 81 F. 2d 19, 22 (2d Cir.), cert. denied, 298 U.S. 677 (1936); Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc., 358 F. Supp. 1001, 1004 (N.D. Ill. 1973); General Electric Credit Corp. v. James Talcott, Inc., 271 F. Supp. 699 (S.D.N.Y. 1966).

Movant's designation of the New York Superintendent of Banks to receive process on its behalf is not a waiver of this venue provision. Although the language of the designation is broad, it specifically evidences an intent to comply with Section 131(c) of the New York Banking Law, which requires such a designation before a foreign bank can operate in a fiduciary capacity in New York. This designation operates as a waiver of the venue provision only in actions involving movant's fiduciary acts in New York, and no such acts are alleged or involved here.

Accordingly, First National Bank of Boston's motion to dismiss this action on the ground of improper venue is granted in all respects." (A-56-7)

THE BROAD AND UNLIMITED DESIGNATION
BY APPELLEE BOSTON BANK OF THE NEW
YORK SUPERINTENDENT OF BANKS TO RE-
CEIVE PROCESS IN ITS BEHALF

"KNOW ALL MEN BY THESE PRESENTS that I, T. McLEAN GRIFFIN am Cashier of The First National Bank of Boston, a national banking association located in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, and organized under the laws of the United States of America. This Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York State Banking Law. The First National Bank of Boston hereby constitutes and appoints the Superintendent of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank in and for the State of New York, upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein.

THE FIRST NATIONAL BANK OF BOSTON hereby designates the undersigned, T. McLEAN GRIFFIN, Cashier, and his successors in office, to be the appropriate officer of the Bank to whom process shall be forwarded by the Superintendent of Banks.

/s/ T. McLean Griffin
T. McLEAN GRIFFIN, Cashier"
(A-47)

It is our contention that since as the Court below noted "the language of the designation is broad", the claim of "improper venue" was and is untenable.

POINTS

- I. THE NEW YORK SUPERINTENDENT OF BANKS WAS BROADLY DESIGNATED AS THE BOSTON BANK'S AGENT "UPON WHOM ALL LAWFUL PROCESSES IN ANY ACTION OR PROCEEDING AGAINST THIS BANK IN NEW YORK MAY BE SERVED IN LIKE MANNER AND WITH THE SAME EFFECT AS IF THIS BANK EXISTED THEREIN."

VENUE IN THIS STATE WAS THEREFORE PROPER. IT WAS ERROR TO HOLD THAT THE BANK'S INTENT WAS NARROWER THAN THAT INDICATED BY THE UNLIMITED LANGUAGE OF THE DESIGNATION IT EXECUTED.

Although the "hardships sometimes imposed on plaintiffs" as a result thereof have caused §94 of the National Banking Act, as amended (12 U.S.C. §94) "to come under severe criticism", we of course recognize that the "special and properly wide venue provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934" do not overcome the "special and exceedingly narrow venue provisions" of §94 of the National Banking Act (12 U.S.C. §94). However, it is noteworthy that FRIENDLY, J., writing for this unanimous Court said: "[w]e conclude with regret that the rulings upholding the claim of prevalence of the 1864 Statute are right."

- 1/ Southeast Guar. Tr. Co., Ltd. v. Rodman & Renshaw, Inc., 358 F. Supp. 1001, 1005; Klein v. Bower, 421 F. 2d 338, 342, 2 Cir. 1970; Bruns, Nordeman & Co. v. American Nat. Bank & Trust Co., 394 F. 2d 300, 302-4, 2 Cir. 1968; Gen. Electric Credit Corp. v. James Talcott, Inc., 271 F. Supp. 699, 707, S.D.N.Y. 1966.
- 2/ Bruns, Nordeman & Co., supra.
- 3/ Bruns, Nordeman & Co., supra.

In the foregoing designation (p. 3, supra), it is stated: "[t]his Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York State Banking Law." The bank's Associate Counsel and Assistant Vice President in the moving affidavit below asserts "that solely in connection with its qualification pursuant to Section 131(3) of the Banking Law of New York to act in a fiduciary capacity in the surrogate's courts of the state and in other fiduciary capacities in the state, the Bank filed an instrument on January 15, 1971 appointing the Superintendent of Banks of the State of New York as its attorney upon whom all process could be served, in any action affecting or relating to an estate, trust or fund held or represented by it."

The Banking Law of New York does provide (Art. 3, §131, subd. 3), that a non-New York bank, as therein specified,

"may act as trustee, guardian, executor, administrator, or in any other fiduciary capacity under any last will and testament or codicil thereto or other testamentary writing or under any deed of trust inter vivos or other written instrument establishing a trust, or by the appointment of any court of said state, may act in this state in any such fiduciary capacity, provided similar domestic corporations which have the power under the law of this state to act herein in any such fiduciary capacity, are permitted to act in like fiduciary capacity in the state where such foreign corporation has its domicile, provided that if such foreign corporation proposes to act in any fiduciary capacity in this state and to do so is required to file its qualification in the surrogate's court of this state, it shall file in the office

of the clerk of the surrogate's court of the county in which application for such appointment is pending

(a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing such clerk and his successors its true and lawful attorney, upon whom all process in any action or proceeding against such fiduciary, affecting or relating to the estate, trust or fund represented or held by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, and (b) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office;"

and

"provided further that if such foreign corporation proposes to act in any other fiduciary capacity in the state, it shall file in the office of the superintendent (a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing the superintendent and his successors its true and lawful attorney, upon whom all process in any action or proceeding against such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent or other person to whom such process shall be forwarded by the superintendent, and (c) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office."

The designation executed by the bank (p. 3, supra) was of course pro tanto a waiver of its right to be sued only in the district in which it is established (12 U.S.C. §94). Had it been phrased in the limited terminology of the foregoing §131, subd. 3 of the New York Banking Law heretofore quoted and underscored, the waiver would have unquestionably been limited to the service of process on the New York Superintendent of Banks in any action or proceeding against the bank as "fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts or defaults of such fiduciary in relation to such estate, trust or fund" (p. 6, supra).

But the bank did not do so. The designation was in the unlimited and broad terminology specified in Art. 5 of the New York Banking Law treating with "foreign banking corporations and national banks", namely §200 thereof, which requires a foreign banking corporation other than a bank organized under the laws of the United States as a precondition to transacting banking business in this state to file a designation in the broad language of the instrument here executed.

The bank through its counsel who prepared the instrument claims that it did not intend to file a designation in the broad form which it was not required to do (A-32); p.5, supra). However, it failed to do what the Chase National Bank did in

Buffum v. Chase Nat. Bank of City of New York, 192 F.2d 58,

7 Cir. 1951, wherein it is pointed out that:

"In this case there is no question but that defendant applied for and obtained leave to transact business in the state of Illinois for the limited purpose of 'acceptance and execution of trusts and receipt of deposits of trust funds in Illinois.' Though its original agent for service was authorized to accept service 'in all suits in Illinois,' when he was replaced with another, the resolution creating the successor's authority provided that he should be the registered agent in matters involving the limited purpose for which defendant was qualified to do business in Illinois. So our question in this respect is, did defendant, by qualifying for the limited purpose of doing trust business in Illinois, intend to waive its right to be sued in a transaction which on its face does not purport to grow out of such trust business?" (p. 61)

Defendant bank in Buffum "moved to dismiss upon the ground, amongst others, that under Title 12 U.S.C.A. §94, an action against defendant may be brought only in the Southern District of New York where it is located;" and that the Chase Bank "in complying with the foreign corporation laws of Illinois and consenting that it might be sued there" had "limited its consent to transaction of business in Illinois only 'in connection with its acceptance and execution of trusts and to receive deposits of trust funds in Illinois.'" (Buffum, supra, p. 59).

This defendant Boston Bank in effect asked the Court below to read into its broad designation the limited language

that was ultimately specifically used in Buffum, asserting that that was its intent. The admittedly broad language employed, we submit, does not manifest any such intent. In judicially determining a litigant's intent, as the New York Court of Appeals has consistently held, "we 'concern ourselves with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote.'" And this notwithstanding that "the real intent of the parties" may have been otherwise (Rodolitz v. Neptune Paper Prods., 22 NY 2d 383, 386-7, 1968; Raleigh Assoc. v. Henry, 302 N.Y. 467, 473).

The acts, activities and transactions in which the defendant bank allegedly was involved, participated in, aided and abetted, as alleged in the complaint, refer to matters in New York (A-16-28) and as was stated in the opposing affidavit below "[p]laintiff's position is that the designation by this defendant bank covers suits arising out of its business conducted in New York." (A-52)

In view of the critical reluctance with which the venue limitation specified in 12 U.S.C. §94 has been applied, as heretofore indicated, we respectfully submit the learned Court below was not constrained to read into the broad language of the designation, the limiting language that did not appear

therein, notwithstanding that such in fact was the actual intent; especially since this record does not establish that in the period following the execution of the designation (January 15, 1971; A-47), defendant Boston Bank did not conduct any other banking business in the State of New York, except as a fiduciary in reference to an estate, trust or fund, etc., as specified in the Banking Law of New York, Article 3, §131, subd. 3. Surely, at least a hearing was warranted if any issue is presented in that regard. (A-23-25; A-32; A-52)

II. THE ORDER DISMISSING THE COMPLAINT
ON THE GROUND OF IMPROPER VENUE
SHOULD BE REVERSED.

Respectfully submitted,

IRA JAY SANDS
Attorney for Plaintiff-Appellant
701 Seventh Avenue
New York, New York 10036
(212) 265-3500

AND

GAINSBURG, GOTTLIEB, LEVITAN & COLE
Co-Counsel for Plaintiff-Appellant
122 East 42nd Street
New York, New York 10017
(212) 697-3440

Samuel Gottlieb
Ira J. Sands
Alan C. Krieger

Of Counsel